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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 200.

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

against

J. G. MENIHAN CORP., J. G. MENIHAN, SR., and J. G. MENIHAN, JR.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement.

On the question as to the power of the United States District Court for the Western District of New York to award trial costs, and entertain a motion for an extra allowance to the respondents in an equity action brought by the petitioner, the Circuit Court of Appeals for the Second Circuit held that the District Court had such power. Petitioner asks this Court to grant certiorari to review such ruling.

Opinions.

The opinion of the District Court is reported at 29 F. Supp. 853; and that of the Circuit Court of Appeals in 111 Fed. (2d) at page 940.

Errata.

On page three of the petition, the learned counsel for the petitioner state that the Reconstruction Finance Corporation made a loan to the J. G. Menihan Corp. (one of the respondents) upon the security of certain collateral. This is incorrect. The loan was made to The Menihan Company in 1934. The respondent corporation was organized in 1937, and never borrowed any money from petitioner. A correct statement of the facts is found in the opinion of District Judge Burke at page 11 of the record.

Question Presented on this Petition.

Are the decisions of this Court, denying immunity to governmental corporations, beginning with *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat, 904, and ending (to date) with *Federal Housing Administration v. Burr*, 60 S. Ct. 488, now to be reopened, overruled and reversed?

Argument.

The petition (p. 4) assigns the following as error:

"The court below erred:

"1. In holding that court costs and additional allowances may be taxed against petitioner.

"2. In taxing costs in that court against petitioner.

"3. In reversing the orders of the District Court appealed from."

It would seem that the issue attempted to be presented involves solely a very ancient question, many times determined, as to the claims of immunity of governmental corporations. In this case, the immunity is claimed from costs only. In other cases, both the two above mentioned, and those of this Court and other Federal Courts listed below, immunity was claimed from liability, from suit, from garnishee or other third party process, and always explicitly denied. To suggest that a novel question is presented here would seem to us to profess an inability to see the woods for the trees.

Authorities follow:

United States v. Strang, 254, U. S. 491, 493.

Sloan Shipyards Corp. v. United States Fleet Corp., 258 U. S. 549.

Missouri Pacific R. Co. v. Ault, 256 U. S. 554.

Continental Nat. Bk. v. Rock Island Rwy Co., 294 U. S. 648, 684.

Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 388.

Pope v. Emergency Fleet Corp., 269 Fed. 319, 320.

The Pesaro, 277 Fed. 473.

Federal Sugar Refining Co. v. United States Sugar Equalization Board, 268 Fed. 575, 584.

Providence Engineering Corp. v. Downey Shipbuilding Corp., 294 Fed. 641.

Lord & Burnham v. U. S. Shipping Bd. Emergency Fleet Corp., 265 Fed. 965.

Inland Waterways Corp. v. Hardee, 300 Fed. 678, 689.

In re Missouri Pac. R. Co., 13 Fed. Supp. 888.

The status of these corporations, of which Congress has spawned a great number (the phrase is Mr. Justice Frankfurter's) was clearly defined by Chief Justice Marshall in *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat, 904, and has remained unchanged ever since. It has never been more clearly stated.

> "It is, we think, a sound principle, that when the government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus many states of this Union who have an interest in banks, are not suable even in their own courts, yet they never exempt the corporations from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. *As a member of a corporation, the government never exercises its sovereignty.*" (Italics supplied.)

It was restated by Mr. Justice Holmes in the *Sloan* case, *supra*, (258 U. S. 549, at page 567).

> "If what we have said is correct, it cannot matter that the agent is a corporation, rather than a

> single man. The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law."

This would seem lucid enough, but some kind of immunity was repeatedly urged (and refused) in some of the later cases cited above. In the *Keifer* case, *supra*, (306 U. S. 381) it became necessary for this Court to emphasize what it had said before, by saying, through Mr. Justice Frankfurter, that immunity was never presumed; that it never arose out of mere implication; that it could be conferred by Congress, of course, but that unless it had been expressly so conferred, it must be deemed to have been withheld. "Congress may of course," he says, "endow a governmental corporation with the government's immunity. But always the question is, has it done so?" And the Court ruled that the immunity, to exist at all, must be found in the Act of Congress creating the corporation, and that the immunity claimed was not there so found.

It was thought that this decision, read in the light of Chief Justice Marshall's statement in *Weston v. City Council of Charleston*, 2 Pet. 449, 464* and the plain words of the statute making costs a part of the judgment,** as well as the rulings of this Court in

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* "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit."

** "Same, bill of; taxation. The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause." Sec. 830, Title 28 U. S. C.

Newton v. Consolidated Gas Co., 265 U. S. 78, P. 83 to the effect that a decree for costs is a judgment in a suit; and in *The Baltimore*, 8 Wall, 377, 390, to the effect that costs are an incident to the judgment,* would, when construed together, remove this controversy from that which Abraham Lincoln called "the realm of pernicious abstraction." However, since more than one of these governmental corporations claimed another immunity (that from third party process), and had had this claim allowed in some of the State Courts** it therefore became necessary for this Court to restate and reaffirm its position on the legal status of these governmental corporations, especially in regard to their constantly recurring claims to share some part of the immunity of the sovereign. This it did, clearly and emphatically, in *Federal Housing Administration v. Burr*, 60 S. Ct. 488, using the following language:

> "As indicated in Keifer & Keifer v. Reconstruction Finance Corporation, *supra*, we start from the premise that such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed. This policy is in line with the current disfavor of the doctrine of governmental immunity from suit, as evidenced by the increasing tendency of Congress to waive the immunity where federal governmental corporations are concerned. Keifer & Keifer v. Reconstruction Finance Corporation, *supra*. Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to 'sue and be sued,' it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to 'sue and be sued' is to be delimited by implied exceptions, it

* cf. *Rooney v. Second Ave. R. R. Co.*, 18 N. Y. 368, 369, 370.

** See cases referred to in footnote to *Federal Housing Administration v. Burr*, 60 S. Ct. 488, 489.

must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense. In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue and be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."

The Alleged Conflict.

Petitioner asserts that the ruling of the Court below is in direct conflict with three decisions; *National Home v. Wood*, 81 Fed. (2d), 963; *Federal Deposit Insurance Corp. v. Barton*, 106 Fed. (2d) 737; and *Federal Deposit Insurance Corp. v. Casady*, 106 Fed. (2d) 784; and this supposed conflict is urged as a reason for granting the writ.

In the *National Home* case, the Court held that the suit was in reality against the United States, despite its form, and denied costs for that reason. Its conclusion was inescapable, in view of the express provisions of Title 38, Section 11d (U. S. C.). There Congress says in so many words that all contracts and other valid obligations of the Home shall continue and be obligations of the United States, "and the United States shall be considered as substituted for said corporation with respect to all such demands either by or against said corporation."

It was because of this statute that the Supreme Court held that costs were properly denied. (299 U. S. 211, note page 212.)

In the *Barton* case the title of the plaintiff to the insured deposit was not entirely clear. So the Circuit Court of Appeals held, in affirming, that it was the duty of the defendant, under Title 12, Section 264, Sub. L (7) U. S. C. to present the issues for the determination of the Court, and for that reason costs should not be taxed against it. Under the circumstances presented in the Court's opinion, we cannot see how it could have held otherwise.

The *Casady* case was an action at law against the Federal Deposit Insurance Corporation. The plaintiff prevailed, and on appeal the judgment was modified by striking out the award of costs in the following language:

> "The question is raised as to costs. Appellant being a governmental agency, costs should neither be awarded in its favor nor against it in this action, and the adjudication against the defendant as to costs is eliminated. Paragraph (d), Rule 54, Federal Rules of Civil Procedure for District Courts."

then follow citations of several cases holding that the appellant and other governmental corporations are governmental agencies, and that only. The immunity of the latter from costs was assumed, not decided; and the text of the language used shows that the Court did not have in mind the text of Rule 54(d). We say this because there is nothing in Rule 54(d) which denies costs to a successful governmental agency, to a successful governmental officer, or to the United States, itself, when it prevails. Of course, such a rule prevails

in this Court (Rule 32.5) and is also found as regards appellate costs in many of the rules of the different Circuit Courts of Appeal, usually expressly limited however to instances where the United States is a party; and it would seem probable that the learned Tenth Circuit had these rules in mind, rather than Rule 54(d). In other words, it appears to be a plain oversight, which might readily have been corrected by petition for rehearing.*

However this may be, the decision of the *Casady* case must be considered as overruled by the holding of this Court in the *Burr* case; since the denial of the greater immunity would seem to dispose of the lesser one.

To rule otherwise would seem to us to be granting to these governmental corporations an immunity not only greater than that of governmental officers (*U. S. ex rel. McBride v. Schurz*, 102 U. S. 378; *U. S. v. Boutwell*, 17 Wall, 604), but also an immunity greater than that of the sovereign itself, for under certain statutes, the United States is amenable to costs (Title 28, U. S. C. 761; Title 46 U. S. C. 781), and Congress appropriates the funds to pay them (First Deficiency Appropriation Act 1940, Chapter 77, 3rd Session 76th Congress, Sec. 202, (a) and (b)).

The contrary suggestion also carries with it an implication that this Court intended, by rule, not only to overturn its own holdings for more than one hundred fifty years, but also to exceed the limitations imposed

* The point seems not to have been stressed,—Appellees' brief contains the following language: "The question of costs is raised by appellant and with this we may have little interest in view of the certainty that if appellees prevail, they will in no event be charged with the costs." Appellees' counsel advises that the costs in dispute did not exceed Ten dollars.

by Congress upon its rule making authority,* although the exact contrary was held by both of the Courts below in this case (Record, p. 19, fol. 94, p. 26), and was in fact urged by the petitioner, itself.

In the light of these considerations, it is believed that there is no such confusion or conflict now existing in the Courts below as to lead to disharmony in decision. The question sought to be presented by the petition, involving as it does solely the status of these governmental corporations before the law, no longer appears to be an open one. To treat it as such at this late date would be (if we may paraphrase a jurist below) a step obviously undesirable.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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* "Said rules shall neither abridge, enlarge or modify the substantive rights of any litigant." Title 28, Sec. 723 (a) U. S. C. Act of June 10, 1934, ch. 651, secs. 1 and 2.

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